

1 GLYNN & FINLEY, LLP
2 CLEMENT L. GLYNN, Bar No. 57117
3 JONATHAN A. ELDREDGE, Bar No. 238559
4 One Walnut Creek Center
5 100 Pringle Avenue, Suite 500
6 Walnut Creek, CA 94596
7 Telephone: (925) 210-2800
8 Facsimile: (925) 945-1975
9 E-mail: cglynn@glynnfinley.com
10 jeldredge@glynnfinley.com

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FILED

2008 JUL 23 P 1:35

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

11
12 Attorneys for Defendant
13 Sears Holding Corporation (erroneously sued as Sears Holding, Inc.)
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JCS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

12 BIALLA & ASSOCIATES, INC.,

13 Plaintiff,

14 vs.

15 SEARS HOLDING, INC. and DOES 1
through 10, Inclusive,

16 Defendant.

CV Case No. 38

3529

NOTICE OF REMOVAL OF ACTION
UNDER 28 U.S.C. § 1441

BY FAX

18

19 TO THE CLERK OF THE ABOVE ENTITLED COURT:

20 PLEASE TAKE NOTICE that pursuant to 28 U.S.C. section 1441, defendant

21 Sears Holding Corporation (erroneously sued as Sears Holding, Inc.; "Sears") hereby removes to
22 this Court the state court action described below:

- 23 1. On June 23, 2008, this action was commenced in the Superior Court of the
24 State of California in and for the County of Marin, entitled "BIALLA & ASSOCIATES, INC.,
25 Plaintiff, vs. SEARS HOLDING, INC. and DOES 1 through 10, inclusive, Defendants," Case
26 Number CV 083051. A copy of the summons and complaint is attached hereto as Exhibit A.
27 2. Sears was formally served with the complaint and summons on July 2,
28 2008.

JURISDICTION

2 3. This action is removable to this Court pursuant to the provisions of 28
3 U.S.C. section 1441.

4 (a) This Court has original jurisdiction over this action under 28 U.S.C.
5 section 1332, in that it is a civil action between citizens of different states and the matter in
6 controversy exceeds the sum of \$75,000, exclusive of interest and costs:

(i) Plaintiff is a California corporation with its principle place of business in Sausalito, California. (Exh. A at ¶ 2.)

(iii) Plaintiff claims damages “in excess of two million dollars (\$2,000,000)” for its breach of contract claim. (Exh. A at ¶ 24.)

INTRADISTRICT ASSIGNMENT

14 4. Pursuant to Civil Local Rule 3-2(c) and (d) this action is properly removed
15 to the San Francisco Division.

16 Dated: July 23, 2008

GLYNN & FINLEY, LLP
CLEMENT L. GLYNN
JONATHAN A. ELDREDGE
One Walnut Creek Center
100 Pringle Avenue, Suite 500
Walnut Creek, CA 94596

By
Attorneys for Defendant
Sears Holding Corporation (erroneously sued
as Sears Holding, Inc.)

EXHIBIT A

**SUMMONS
(CITACION JUDICIAL)**

NOTICE TO DEFENDANT:**(AVISO AL DEMANDADO):**

Sears Holdings, Inc. and Does 1 through 10, inclusive

YOU ARE BEING SUED BY PLAINTIFF:**(LO ESTÁ DEMANDANDO EL DEMANDANTE):**

Bialla & Associates, Inc.

SUM-100

FOR COURT USE ONLY (SOLO PARA USO DE LA CORTE)
FILED
JUN 23 2008
KIM TURNER, Court Executive Officer MARIN COUNTY SUPERIOR COURT <i>By: S. Bond, Deputy</i>

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court. There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia. Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:
(El nombre y dirección de la corte es):

Marin County Superior Court
3501 Civic Center Drive
San Rafael, CA 94104

CASE NUMBER:
(Número del Caso): **083051**

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Laurence F. Pulgram (CSB No. 115163)

Telephone: 415-875-2300

Jennifer L. Kelly (CSB No. 193416)

Telephone: 415-875-2300

Fenwick & West LLP

555 California Street, 12th Floor, San Francisco, CA 94104**S. BOND**DATE: **JUN 23 2008**Clerk, by **M. TURNER** Deputy
(Secretario) **(Adjunto)**

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

(SEAL)

SEAL

1. as an individual defendant.
2. as the person sued under the fictitious name of (specify):
3. on behalf of (specify): Sears Holdings, Inc.
under: CCP 416.10 (corporation)
 CCP 416.20 (defunct corporation)
 CCP 416.40 (association or partnership)
 other (specify): CCP 416.60 (minor)
 CCP 416.70 (conservatee)
 CCP 416.90 (authorized person)
4. by personal delivery on (date):

1 LAURENCE F. PULGRAM (CSB NO. 115163)
2 JENNIFER L. KELLY (CSB NO. 193416)
3 FENWICK & WEST LLP
4 555 California Street, 12th Floor
5 San Francisco, CA 94104
6 Telephone: (415) 875-2300
7 Facsimile: (415) 281-1350
8 Attorneys for Plaintiff
9 BIALLA & ASSOCIATES, INC.

FILED

JUN 23 2008

KIM TURNER, Court Case File Office
MARIN COUNTY SUPERIOR COURT
By: S. Bond, Dmtr

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MARIN

10 BIALLA & ASSOCIATES, INC.

11 Case No. C 083051

12 Plaintiff,

13 v.
14 COMPLAINT FOR BREACH OF
15 SEARS HOLDINGS, INC. and DOES 1
16 through 10, inclusive,
17 MISREPRESENTATION, AND
18 Defendants.
19 DECLARATORY RELIEF

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

20 Plaintiff Bialla & Associates, Inc. ("Bialla") alleges for its Complaint against defendant
21 Sears Holdings, Inc. ("Sears") as follows:

NATURE OF THE ACTION

22 1. Bialla brings this action for breach of contract, negligent misrepresentation and
23 declaratory relief to recover fees it is owed by Sears under several written and oral agreements
24 between the parties pursuant to which, at Sears' request, Bialla searched for, recruited, and placed
25 numerous highly qualified candidates as employees or consultants of Sears. As detailed below,
26 although Sears represented and agreed that it would pay the entirety of Bialla's standard fee on all
27 such placements, Sears has wrongfully refused to pay substantial portions of Bialla's fee with
28 respect to three executive-level hires and the entirety of Bialla's fee with respect to approximately
one dozen engineers and other hires that Bialla presented to Sears in the course of its assignment.

COMPLAINT

CASE NO. _____

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

PARTIES

2. Plaintiff Bialla is a corporation organized and in good standing under the laws of California, and at all times mentioned herein was a resident of Marin County, California, with its principal place of business in Sausalito, California. Bialla is a nationally-recognized retained search and management consulting firm that locates, recruits, and places highly qualified candidates with its clients in both employment and consulting positions ranging from senior executive-level positions and outside directors to mid-level functional positions such as marketing, engineering, sales, finance, HR and legal.

3. On information and belief, defendant Sears is an affiliate and an agent of Sears Holding Corporation and is, and at all times herein mentioned was, a corporation organized under the laws of Delaware, with its principal place of business in Hoffman Estates, Chicago. On information and belief, Sears has engaged in numerous and systematic business in California and within this county by, *inter alia*, operating and marketing numerous retail locations under the names of Sears, Kmart, The Great Indoors, Orchard Supply Hardware, and Land's End.

4. Bialla is unaware of the full names and capacities, whether individual, corporate, or otherwise, of the defendants named herein as Does 1 through 10, inclusive, and therefore sues those defendants by such fictitious names. Pursuant to Code of Civil Procedure Section 474, Bialla will seek leave to amend the Complaint to allege said defendants' true names and capacities when ascertained.

VENUE

5. Venue is proper in Marin County pursuant to Code of Civil Procedure Section 395.5, because, *inter alia*, liability arose within Marin County, and the contracts relevant to this action were to be performed, in substantial part, in Marin County.

GENERAL ALLEGATIONS

The Parties' Agreements and Sears' Commitment To Pay Bialla's Standard Fee

6. In mid 2007, Sears approached Bialla concerning its need to fill several employment positions within the organization. At Sears' request, Bialla partner Gordon Tucker traveled to Sears' headquarters in Hoffman Estates, Illinois, to meet with Sears employees David

1 Cross and Robert Luse, who represented that they were in charge of hiring at Sears and had
2 authority to retain Bialla for these searches.

3 7. During this meeting, which took place on or about July 25, 2007, the parties
4 discussed three positions that Sears needed filled: Vice President General Manager, Kmart.com;
5 Divisional Vice President Product Management, Sears Holdings; and Vice President General
6 Manager, Sears.com. The parties had extensive discussions concerning both the types of
7 compensation Sears would pay any hired candidate and the fees Bialla would receive in
8 connection with these searches. With respect to the former, Cross and Luse represented that since
9 Sears compensates its employees primarily in cash, and does not offer stock options in the
10 corporation, executive compensation packages would include a strong base salary, participation in
11 the company's annual cash bonus programs including the Long Term Incentive Plan (the
12 "LTIP"), and restricted stock grants based on a multiple of base salary. All were repeatedly
13 described by Cross and/or Luse as "cash-based" compensation since all incentive programs are
14 calculated based on a fixed percentage of the employee's annual base salary. Luse further
15 described participation in the LTIP as part of an employee's *annual* compensation, since the
16 program "refreshes" every calendar year into a new three-year program.

17 8. With respect to Bialla's fees, Tucker explained that Bialla's search fee is based on
18 all forms of cash-based compensation, including incentives, paid to hired candidates during the
19 first year (and would apply to all executive level candidates that Sears eventually hired based on
20 Bialla's introduction), and that the standard Bialla fee agreement stated this. Both Cross and Luse
21 represented that this fee arrangement was acceptable to Sears, and that Sears customarily paid
22 recruiting firms on all forms of cash compensation. Tucker then presented Sears with Bialla's
23 standard fee agreement for the three searches the parties had discussed. Cross and Luse reviewed
24 the agreements, proposed certain changes relating to the timing of the payments (which were
25 accepted by Bialla), and on August 29, 2007, Cross executed each of the three fee agreements on
26 behalf of Sears. That same day, Cross also executed a fee agreement with Bialla (on behalf of
27 Sears) for an additional executive-level search that Luse had requested of Bialla on August 3,
28 2007 (for the position of Executive Vice President, "Newco") (the "Newco Agreement"), a copy

1 of which is attached hereto as Exhibit A. As with the other three fee agreements, Sears proposed
 2 certain changes to the Newco Agreement relating to the timing of the payments, which were
 3 accepted by Bialla.

4 9. Each of the four fee agreements obligates Sears to pay Bialla 33 1/3% "of the first
 5 year's cash compensation of the individual specified," defined in the contract as "base salary plus
 6 signing bonus (if any) and target cash performance bonus. Stock options grants are specifically
 7 excluded." The agreements further provide that Sears is obligated to pay Bialla's fee if Sears or
 8 its affiliate companies hire "any candidate presented by [Bialla] during this search assignment for
 9 another position above and beyond the assignment described in this agreement within twelve
 10 months of the date of this Agreement." The agreements further obligate Sears to pay Bialla's
 11 attorneys' fees and costs in the event Bialla has to take any action to collect its fees. *See, e.g.*,
 12 Exhibit A.

13 **Bialla's Search For and Placement of Numerous Highly Qualified Candidates**

14 10. Bialla began searching for candidates to fill these four positions immediately after
 15 the fee agreements were signed. Shortly thereafter, however, Luse advised Tucker that Sears
 16 urgently needed a Senior Vice President, Chief Technology Officer ("CTO") and requested Bialla
 17 make the CTO search Bialla's top company priority—even if it meant Tucker, as lead partner on
 18 the Sears engagement, had to drop work for other firm clients. Luse emphasized that Sears had a
 19 desperate need for strong engineering leadership and talent, given the "technology hole" the
 20 company found itself in. Bialla agreed to do so, and on September 19, 2007 Sears executed
 21 another fee agreement with Bialla containing the same terms as those described above (the
 22 "CTO Agreement"), a copy of which is attached hereto as Exhibit B. As with the other four fee
 23 agreements, Sears proposed certain changes to the CTO Agreement relating to the timing of the
 24 payments, which were accepted by Bialla.

25 11. Although the LTIP and restricted stock grants the CTO would receive would be
 26 substantially greater than that potentially to be offered to corporate VP positions, in executing the
 27 CTO Agreement, Luse specifically represented and agreed that the basis for Bialla's fee would be
 28 identical to that agreed to for the other four searches, on *all* cash-based compensation as

1 discussed in Paragraphs 7-8 above. Additionally, Tucker and Luse specifically discussed
2 anticipated compensation package possibilities for the CTO that would likely be of far greater
3 value than originally contemplated for the EVP, Newco search, given market conditions at that
4 time. Tucker advised that Bialla had relationships with potential CTO candidates accustomed to
5 earning in the range of \$3-\$15 million per year total compensation, and Luse specifically
6 acknowledged this information and agreed that Sears would pay what was necessary to hire the
7 people it so urgently needed. At no point was there any discussion by the parties or any request
8 by Luse or anyone else at Sears to change the fee structure from the prior four fee agreements that
9 included LTIP and restricted stock grants in the fee calculation.

10 12. After the CTO Agreement was executed and Sears' commitment to compensate
11 Bialla on all forms of any hired candidate's cash compensation re-confirmed as described in
12 Paragraph 11, above, Bialla immediately began searching for CTO candidates. In the course of
13 that search, Bialla recommended that, given the depth of Sears' technology hole, in addition to
14 hiring a CTO, Sears hire a Chief Science Officer ("CSO"). Sears agreed with this
15 recommendation, and ultimately hired Kelly Wical, a candidate Bialla presented on
16 September 26, 2007.

17 13. During the course of the CTO search, Bialla also recommended that, given Sears'
18 desperate need for engineering talent, it hire the engineering employees of MediaMaster, a
19 company founded by Neil Day, a candidate Bialla presented for the CTO position in early
20 October 2007. Bialla recommended that these engineers be hired ideally via an acquisition of
21 MediaMaster, so that Sears could also gain access to the company's ecommerce expertise.
22 Through Bialla's connections with former executives of Walmart.com (where Day had been the
23 Chief Information Officer before founding MediaMaster), Bialla knew that the MediaMaster
24 engineers had deep experience in exactly the sort of help Sears needed, due to their work on the
25 Walmart.com and homewarehouse.com implementations. Bialla also knew that Day soundly
26 endorsed these engineers, and favored the idea of their joining Sears as a team to accelerate its
27 ecommerce business. Bialla thus first raised the idea of hiring these engineers during a telephone
28 call with Sears employee John Walden on September 28, 2007, during which Tucker urged Sears

1 to consider buying MediaMaster to gain access to its technology and its engineers. Walden
 2 expressed significant interest in this recommendation. Bialla raised the idea of obtaining these
 3 engineers again on October 22, 2007 and on October 29, 2007, during which he reiterated the
 4 benefits of gaining access to MediaMaster's engineers. On information and belief, but for
 5 Bialla's recommendation of the MediaMaster engineers, which it presented in combination with
 6 Day, Sears had no other connection with this group, nor any knowledge of their existence,
 7 qualifications, prior experience, or potential availability.

8 14. Sears ultimately hired candidates presented by Bialla for three SVP-level
 9 positions: Jim Barr (EVP, Newco); Neil Day (CTO), and Kelly Wical (CSO). All of these
 10 searches were completed in record time—indeed, Wical joined the company in November 2007;
 11 Day joined the company in December 2007; and Barr joined the company in January 2008. Sears
 12 also acquired MediaMaster—and, on information and belief, has now hired its engineers—as of
 13 early February 2008. Bialla's introduction was clearly an essential element to Sears having
 14 obtained these engineers' service since, but for Bialla's introductions, Sears would never have
 15 connected with these critical employees.

16 **Sears' Acknowledgement That It Owed Fees in Connection with LTIP and Stock Grants**

17 15. During the course of the searches Bialla performed for Sears, Sears advised that it
 18 was extremely pleased with the recruiting services Bialla provided. For example, shortly after
 19 Day and Wical joined SHC, Walden informed Tucker that their placement was "the best
 20 recruiting work that he had ever seen," and that while Day's and Wical's compensation packages
 21 were higher than Sears initially had planned, these executives were "totally worth it and were
 22 already making a big difference at the company."

23 16. On November 29, 2007, Tucker sent an email to Sears employee Toyin Ogun, in
 24 which he asked Sears to confirm the proper calculation of Bialla's fee with respect to the LTIP
 25 component of Day and Wical's compensation packages so that Bialla could invoice for these
 26 searches. Due to the fact that these new hires were arriving mid-year, and were receiving pro-
 27 rated access to the LTIP, Bialla wanted to confirm that all were in agreement as to the
 28 corresponding fractional calculation of Bialla's fee. In this regard, Tucker specifically

1 highlighted to Sears' attention the fractional treatment of the LTIP, which was premised, of
 2 course, on Sears' representation and agreement that LTIP would be included within the fee
 3 calculation. Ogun replied the next day, requesting that Tucker confirm the calculations with Luse
 4 and then send the invoices for approval. Tucker emailed the calculations to Luse that same day,
 5 and during a phone call between Tucker and Luse on November 30, 2007, Luse informed Tucker
 6 that the calculations looked correct to him and that he had approved them and sent them to Ogun
 7 to confirm the numbers used in the calculations and to process Bialla's invoices. On December 3,
 8 2007, Tucker received a phone call from Ogun, who confirmed Luse's approval of Bialla's fee
 9 calculation, and that Ogun had reviewed the numbers, approved them, and requested that Tucker
 10 invoice Sears based on this approval. Tucker then invoiced Sears for the CTO and CSO searches
 11 based on those approved calculations.

12 **Sears' Subsequent Refusal to Pay Fees Clearly Owed To Bialla**

13 17. Meanwhile, Sears was completing work on a major reorganization and a
 14 significant number of the persons with whom Bialla had interacted eventually left the company.
 15 This included Walden and Luse. On January 15, 2008—in the midst of these announced or
 16 planned management changes, and six weeks after Luse and Ogun had approved the invoices on
 17 December 3—Ogun informed Tucker that he had been told that Sears had a policy against paying
 18 recruiting firms commissions on the cash value of LTIPs. Ogun admitted he viewed the policy as
 19 completely unfair, specifically acknowledging that commissions on the cash value of Day's,
 20 Wical's, and Barr's LTIP packages were owed to Bialla. Ogun nevertheless requested Bialla
 21 submit revised invoices for these searches that omitted the portion of Bialla's fee attributable to
 22 the LTIPs, so that Ogun could at least get approval to pay a portion of Bialla's fee before the
 23 close of Sears' fiscal year. Bialla complied with this request, but specifically reserved its right to
 24 collect the remaining portion of its fees.

25 18. On or about February 1, 2008, Ogun called Tucker and advised that Sears was
 26 now, for the first time, disputing its obligation to pay Bialla's fees with respect to the restricted
 27 stock component of Day's, Wical's, and Barr's compensation packages. This was despite Ogun's
 28 and Luse's approval of payment on those sums in December. Ogun thus requested Bialla revise

1 its invoices yet again, this time to remove the restricted stock component and reflect only the
2 Bialla fee that would be calculated on starting salary, sign-on bonus and the non-disputed year
3 one performance bonus. Bialla did so, again expressly reserving its rights. On or about March 4,
4 2008, Sears issued a payment to Bialla for the services it provided in connection with Sears'
5 hiring of Day, Wical and Barr, which omitted the fees that were owed in connection with the
6 LTIP and restricted stock components of these employee's compensation packages.

7 19. Between February and April 2008, Bialla repeatedly requested that Sears pay the
8 remainder of Bialla's fees related to the hiring of Day, Wical and Barr, any fees owed in
9 connection with the hiring of any of the dozens of other candidate Bialla presented during the
10 course of these searches (on information and belief, Sears has hired at least one such candidate),
11 and to provide copies of the employment agreements for the former MediaMaster engineers Sears
12 hired so that Bialla can calculate the fees owed for these placements (which Bialla estimates to be
13 in excess of \$800,000). To date, Sears has flatly refused to do so.

FIRST CAUSE OF ACTION

(Breach of Contract)

(Against Sears and DOES 1 through 10)

16 20. Bialla realleges and incorporates herein Paragraphs 1 through 19, above.

17 21. Bialla entered into two agreements with Sears, each consisting of a combination of
18 written and oral terms. The Newco Agreement consists of the writing attached as Exhibit A and
19 the additional oral terms described in Paragraph 7 and 8. The CTO Agreement consists of the
20 writing attached as Exhibit B and the additional oral terms described above in Paragraphs 7, 8,
21 and 11. (Collectively, the "Agreements.")

22 22. Bialla has performed all of its obligations with regard to the Agreements without
23 material breach thereof, except those obligations the performance of which has been waived or
24 excused by Sears' breach.

25 23. By the acts alleged herein, Sears has breached the Agreements, including, without
26 limitation, by: (1) failing and refusing to pay Bialla the portion of its fee corresponding to the
27 LTIP and restricted stock components of Day's, Wical's, and Barr's compensation packages;
28 (2) failing and refusing to pay Bialla any fees in connection with other candidates it has hired that

were presented by Bialla in the course of the searches it performed pursuant to the Agreements; and (3) failing and refusing to pay Bialla any fees in connection with the hiring of the former MediaMaster engineers.

4 24. As a direct and proximate result of Sears' breach of contract, Bialla has suffered
5 damages in an amount to be proven at trial, believed to be well in excess of two million dollars
6 (\$2,000,000).

SECOND CAUSE OF ACTION

(Negligent Misrepresentation)

(Against Sears and DOES 1 through 10)

9 25. Bialla realleges and incorporates herein Paragraphs 1 through 24, above.

10 26. In the course of the parties' discussions concerning Sears' hiring needs and the
11 fees that Bialla would charge to fill these positions, Sears represented that LTIP and restricted
12 stock grants based on a multiple of salary are "cash-based" compensation. Sears further
13 represented that it understood the Agreements to obligate Sears to pay Bialla's fee with respect to
14 any LTIP and restricted stock components of a hired candidate's compensation. These
15 representations—which were a material inducement for Bialla to enter into the Agreements and to
16 provide Sears with the extremely responsive and successful service that it did—were false.

17 27. Representatives of Sears made these representations without any reasonable
18 ground for believing them to be true, in that, these representatives had primary responsibility for
19 hiring and negotiating contracts with recruiting firms on behalf of Sears, and in that capacity,
20 should have been aware of Sears' purported policies as they have now been articulated
21 concerning payments to recruiting firms in connection with LTIPs and restricted stock
22 components of hired candidates' compensation packages.

23 28. These representations were made with the intent to induce Bialla to rely on them
24 and/or with the expectation that Bialla would rely on them, and Bialla did, in fact, rely on them by
25 entering into the Agreements, prioritizing Sears' hiring needs, and searching for and ultimately
26 placing numerous highly qualified candidates at Sears.

27 29. Bialla was unaware of the falsity of these representations, and was justified in
28 relying on these representations, particularly since they were made by the individuals responsible

1 for hiring at Sears.

2 30. As a result of Bialla's reliance on the truth of the misrepresentations, Bialla
3 sustained damage.

THIRD CAUSE OF ACTION

Declaratory Relief under California Code of Civil Procedure Section 1060
(Against Sears and DOES 1 through 20)

6 31. Bialla realleges and incorporates herein Paragraphs 1 through 30, above.
7 32. An actual controversy has arisen and now exists between Bialla and Sears
8 regarding their respective rights and duties arising from the Agreements and/or other
9 representations made by Sears. Bialla contends Sears is obligated to pay Bialla: (1) with respect
10 to Sears' hiring of Day, Wical, and Barr, fees equivalent to 33 1/3 percent of the first year value
11 of these employees' LTIP and restricted stock grants; and (2) with respect to Sears' hiring—in
12 any capacity, whether as employees or consultants—of the former MediaMaster engineers and
13 any other candidates presented by Bialla in the course of the searches conducted pursuant to the
14 Agreements, fees of 33 1/3 percent of these hires' first year's cash compensation, with "cash
15 compensation" defined to include salary, signing bonus, performance bonus, LTIP, and restricted
16 stock grants. Sears disputes that any of these fees are owed.

17 33. Such a declaration is necessary and appropriate at this time so that Bialla may
18 ascertain the extent of its rights with respect to Sears' hiring of the above-described employees
19 and/or consultants. Only by a judicial determination will the parties' dispute be resolved.

20 34. The Agreements specify that in the event any action is required for Bialla to
21 collect its fee from Sears, Sears will pay all of Bialla's costs of collection, including reasonable
22 attorneys' fees and disbursements. Bialla has incurred significant attorneys' fees and costs in
23 collecting the fees it is owed by Sears, and seeks a judicial declaration that it is entitled to recover
24 its fees and disbursements from Sears, including those incurred in pre-litigation negotiations.

PRAYER FOR RELIEF

WHEREFORE, Bialla prays for judgment on all causes of action as follows:

27 1. An award of actual damages according to proof but in excess of two million
28 dollars (\$2,000,000);

- 1 2. A declaration that Sears is obligated to pay Bialla: (1) with respect to Sears' hiring
 2 of Day, Wical, and Barr, fees equivalent to 33 1/3 percent of the first year value of these
 3 employees' LTIP and restricted stock grants; (2) with respect to Sears' hiring—in any capacity,
 4 whether as employees or consultants—of the former MediaMaster engineers and any other
 5 candidates presented by Bialla in the course of the searches conducted pursuant to the
 6 Agreements, fees of 33 1/3 percent of these hires' first year's cash compensation, with "cash
 7 compensation" defined to include salary, signing bonus, performance bonus, LTIP, and restricted
 8 stock grants; and (3) its reasonable attorneys' fees and disbursements incurred in pursuing
 9 collection of these fees, including during pre-litigation negotiations;
- 10 3. An award of prejudgment interest, costs of suit, and reasonable attorneys' fees and
 11 disbursements to the extent provided by the agreements and provided by law; and
- 12 4. Such other and further relief as the Court deems just and proper.

13 Dated: June 23, 2008

FENWICK & WEST LLP

14
 15 By: Jennifer L. Kelly /sd/
 Jennifer L. Kelly

16
 17 Attorneys for Plaintiff
 BIALLA & ASSOCIATES, Inc.

18
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EXHIBIT A

RECRUITMENT

-AUG.21 2007 11:41AM RECRUITMENT DEPT SHC

NO.216 P.7

B I A L L A

#2757
SpB=VB
SE=GT

EXECUTIVE SEARCH AGREEMENT

EFFECTIVE: August 9, 2007

Sears Holdings, Inc., hereafter referred to as Client, requests the services of Bialla and Associates, Inc., hereafter referred as B & A, for the purpose of identifying and referring to Client qualified applicants for the position of Executive Vice President, "Newco".

Client will pay a fee of 33 1/3% of the first year's cash compensation of the individual specified. First year's compensation is defined as base salary plus signing bonus (if any) and target cash performance bonus. Stock option grants are specifically excluded.

Client will pay one-third of the cash fee upon B & A's submission of an initial invoice for this search, and one-third at the end of each of two consecutive months thereafter, unless the search is successfully concluded earlier, when the balance of the fee will be due in full. Final payment at placement.

Client will pay reasonable out-of-pocket expenses for such items as travel, lodging, and communications incurred by B & A in the performance of services, approved by Client, and all expenditures of \$25 or more will be supported by receipts.

The search will continue either until an individual acceptable to Client is located or until Client requests B & A to discontinue such search. If Client requests B & A to discontinue such search during the initial three-month period, B & A will be paid a pro rata portion of the cash fee based on the time B & A conducted the search, compared to the initial three-month period. If Client requests cancellation of the search after the three-month period, the full cash fee will be considered earned by B & A.

B & A will subject all possible candidates, even those identified by the client through its personal or professional relationships, in or outside the organization, to the same qualification process.

Our fees and expenses are neither refundable nor contingent upon our success in placing a candidate with your organization. This fee structure applies even if an internal candidate emerges as your choice.

AUG. 21. 2007 11:41AM RECUITMENT DEPT SHC

NO. 216 P.B

Executive Search Agreement
(continued)

Page Two

If the three month billing period is completed and the position is still open, Client may request B & A continue the search. In this case, B & A will bill Client for its costs and expenses only and no fee will be charged to Client.

Should Client or any Client affiliate company hire any candidate presented by B & A during this search assignment for another position above and beyond the assignment described in this agreement within twelve months of the date of this Agreement, it is agreed that B & A will be entitled to receive a fee that is consistent with standard B & A fees for a search at the level of the hired candidate.

In the unlikely event that any action is required to collect B & A's fee, Client agrees to pay all of B & A's costs of collection, including reasonable attorneys' fees and disbursements.

Accepted and agreed:

BIALLA and ASSOCIATES, INC.

By: Ole

Date: 8/9/07

Accepted and agreed:

SEARS HOLDINGS, INC.

By: D. D. S.

Date: 8/12/07

EXHIBIT B

#2762
SOB=VB
SE=GT

B I A L L A

EXECUTIVE SEARCH AGREEMENT

Effective: September 12, 2007

Sears Holdings, Inc., hereinafter referred to as Client, requests the services of Blalla and Associates, Inc., hereinafter referred as B & A, for the purpose of identifying and referring to Client qualified applicants for the position of Senior Technology Officer.

Client will pay a fee of 33 1/3% of the first year's cash compensation of the individual specified. First year's compensation is defined as base salary plus signing bonus (if any) and target cash performance bonus. Stock option grants are specifically excluded.

Client will pay one-third of the cash fee upon B & A's submission of an initial invoice for this search, and one-third at the end of each-of-two-consecutive-months thereafter, unless the search is successfully concluded earlier, when the balance of the fee will be due-in-full. *Month 2* Final payment at placement.

Client will pay reasonable out-of-pocket expenses for such items as travel, lodging, and communications incurred by B & A in the performance of services, approved by Client, and all expenditures of \$25 or more will be supported by receipts.

The search will continue either until an individual acceptable to Client is located or until Client requests B & A to discontinue such search. If Client requests B & A to discontinue such search during the initial three-month period, B & A will be paid a pro rata portion of the cash fee based on the time B & A conducted the search, compared to the initial three-month period. If Client requests cancellation of the search after the three-month period, the full cash fee will be considered earned by B & A.

B & A will subject all possible candidates, even those identified by the client through its personal or professional relationships, in or outside the organization, to the same qualification process.

Our fees and expenses are neither refundable nor contingent upon our success in placing a candidate with your organization. This fee structure applies even if an internal candidate emerges as your choice.

Executive Search Agreement
(continued)

Page Two

If the three month billing period is completed and the position is still open, Client may request that B & A continue the search. In this case, B & A will bill Client for its costs and expenses only, and no additional fee will be charged to Client.

Should Client or any Client affiliate company hire any candidate presented by B & A during this search assignment for another position above and beyond the assignment described in this Agreement within twelve months of the date of this Agreement, it is agreed that B & A will be entitled to receive a fee that is consistent with standard B & A fees for a search at the level of the hired candidate.

In the unlikely event that any action is required to collect B & A's fee, Client agrees to pay all of B & A's costs of collection, including reasonable attorneys' fees and disbursements.

Accepted and agreed:

BIALLA and ASSOCIATES, INC.

By: _____

Date: 9/12/07

Accepted and agreed:

SEARS HOLDINGS, INC.

By: _____

Date: 9-19-07